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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re:	)	Case No.: 16-16771-GS
	)	
Nutrition Rush, LLC	)	Chapter 11
	)	
Debtor.	)	Hearing Date: OST Pending
	)	Hearing Time: OST Pending

**MOTION FOR ENTRY OF AN ORDER UNDER 11 U.S.C. §§ 105, 363,  
365, 506 AND FEDERAL RULE OF BANKRUPTCY PROCEDURE  
6004 APPROVING THE SALE OF DEBTOR'S INVENTORY  
LOCATED IN DEBTOR'S RETAIL STORES AND ASSIGNMENT  
AND ASSUMPTION OF CERTAIN UNEXPIRED RETAIL STORE LEASES**

The above captioned debtor and debtor-in-possession (the “**Debtor**”), hereby moves this Court for entry of an order under 11 U.S.C. §§ 105, 363, 365 and 506 and Federal Rule of Bankruptcy Procedure 6004 approving the sale of the Debtor’s inventory located in retail stores and approving the assignment and assumption of certain unexpired retail store leases (the “**Motion**”). In support of the Motion, the Debtor respectfully states as follows:

**JURISDICTION**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2). Venue of this Chapter 11 case in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105, 363, 365 and 506 of title 11 of the United States Code (as amended, the “**Bankruptcy Code**”).

### **BACKGROUND**

3. The Debtor filed a voluntary petition in this Court on December 22, 2016 (the “**Petition Date**”), for reorganization relief under Chapter 11 of the Bankruptcy Code.

4. The Debtor is a health supplement retailer, operating in Nevada, Arizona, and California.

5. The Debtor owns and maintains various health supplements, vitamin packs, and nutrition powders (the “**Inventory**”) located in their retail stores.

6. The Debtor has several lease agreements for their retail stores in which the Debtor is either a lessee, sublessee, or a sub-tenant of commercial property leases.

7. On January 5, 2017, the Debtor filed a motion for the entry of an order authorizing the Debtor to assume certain leases (“**Motion to Assume and Reject Certain Leases**”) (see Docket No. 31) including lease agreements (collectively, the “**Leases**”) for the following locations (collectively, the “**Stores**”):

- a. 4050 Airport Center Dr. Palm Springs, CA 92264 (the “**Palm Springs Store**”);
- b. 77920 Country Club Dr., Palm Desert, CA 92211 (the “**Palm Desert Store**”);
- c. 9705 S. Eastern Ave., Las Vegas, NV 89123 (the “**Eastern Store**”);
- d. 2655 S. Maryland Parkway, Las Vegas, NV 89109 (the “**Maryland Store**”);
- e. 1725 N. Rainbow Blvd., Las Vegas, NV 89108 (the “**Rainbow Store**”); and
- f. 6050 N. Decatur Blvd., Las Vegas, NV 89031 (the “**Decatur Store**”).

8. By order dated March 8, 2017, the Court authorized the Debtor to assume the aforementioned Leases, among others. See Docket No. 83.

9. On August 28, 2017, the Debtor and Mike's Muscle, Inc. (the "**Buyer**") entered into a purchase agreement (the "**Purchase Agreement**"), a copy of which is attached hereto as **Exhibit A**,<sup>1</sup> to: (i) purchase the Debtor's inventory (the "**Inventory**") located at each Store; and (ii) assume the Leases for all Stores save the Decatur Store.

10. Specifically, the Buyer will pay the Debtor a total of \$27,836.75 for the Inventory and assignment of the Leases, detailed as follows:

- a. Palm Springs Store. \$6,478.65 for the Inventory and assignment of the Lease at the Palm Springs Store.
- b. Palm Desert Store. \$5,876.65 for the Inventory and assignment of the Lease at the Palm Desert Store.
- c. Eastern Store. \$6,236.45 for the Inventory and assignment of the Lease at the Eastern Store.
- d. Maryland Store. \$3,840.00 for the Inventory and assignment of the Lease at the Maryland Store.
- e. Rainbow Store. \$1,140.00 for the Inventory and assignment of the Lease at the Rainbow Store.
- f. Decatur Store. \$4,265.00 for the Inventory only at the Decatur Store.

11. The six (6) Stores listed above are the only stores in which the Debtor is still operating. Upon the sale of the Inventory and assignment of the Leases to the Buyer, the Debtor will no longer operate its business at the Stores.

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<sup>1</sup> The attached signed agreement inadvertently shows an incorrect total purchase price of \$29,876.75. The Debtors intend to amend upon the Court's approval of this Motion, which reflects the correct purchase price of \$27,836.75.

**RELIEF REQUESTED**

12. By this Motion, the Debtor seeks an order authorizing the sale of the Inventory and assignment of the Leases (except for the Lease for the Decatur Store), for a total minimum sale price of \$27,836.75, free and clear of all liens, claims, encumbrances, and interests and exempt from any stamp, transfer, recording or similar tax. The Debtor also requests that the sale be subject to higher and better offers, in the event an interested party is willing to exceed the current sale price for the Inventory and Leases.

13. As set forth in Section 1(c) of the Purchase Agreement, specifically excluded from the sale of the Inventory and assignment of the Leases are any and all causes of action, including but not limited to any avoidance actions under Chapter 5 of the Bankruptcy Code or similar state or federal avoidance actions against all third parties, and all causes of action against insiders or other related parties possess by the bankruptcy estate of the Debtor.

14. Furthermore, the Debtor seeks an order authorizing the assignment of the Leases from the Debtor to the Buyer, or its designee.

15. The Debtor further requests that the Buyer be designated as a good faith purchaser, and that the Court waive the fourteen-day stay period pursuant to Bankruptcy Rule 6004(h).

**BASIS FOR RELIEF**

**A. Request for Approval of Sale Pursuant to 11 U.S.C. § 363(b).**

16. The Debtor may sell their Inventory currently located in multiple retail stores maintained by the Debtor. Under section 363(b) of the Bankruptcy Code, the debtor in possession “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. 363(b). Courts in this jurisdiction state that

1 section 363(b) “allows the debtor in possession to sell, other than in the ordinary course of  
2 business, ‘property of the estate.’” See In re Hurt, 9 Fed.Appx. 780 (9th Cir. 2001). Here, the  
3 Inventory for Sale is property of Debtor’s estate, and therefore may be sold pursuant to section  
4 363(b).  
5

6 17. Courts in this jurisdiction stated that section 363(b) “allows the debtor in  
7 possession to sell, other than in the ordinary course of business, ‘property of the estate.’” See In  
8 re Hurt, 9 Fed.Appx. 780 (9th Cir. 2001). Courts required that such use, sale or lease be based  
9 upon the debtor’s sound business judgment. In re Ernst Home Ctr., Inc., 209 B.R. 974, 980  
10 (Bankr. W.D. Wash. 1997); Matter of Plaza Family Partnership, 95 B.R. 166, 173 (E.D. Cal.  
11 1989). “The business judgment rule ‘is a presumption that in making a business decision the  
12 directors of a corporation acted on an informed basis, in good faith and in the honest belief that  
13 the action was in the best interests of the company.’” In re Integrated Resources, Inc., 147 B.R.  
14 650, 656 (Bankr. S.D.N.Y. 1992).  
15  
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19 18. The Debtor’s decision to sell the Inventory to the Buyer is supported by the  
20 Debtor’s sound business judgment and will benefit the Debtor’s estate. Given the fact the  
21 Debtor no longer believes its current business operations and revenue stream will allow it to  
22 proposed and fund a viable Chapter 11 plan, the Debtor is believes selling the Inventory and  
23 related assumption and assignment of the Leases to the Buyer offers the most economical and  
24 expedited solution in the pursuit of maximizing recoveries for the benefit of creditors and  
25 administrative claimants.  
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28 **B. Request for Approval of Sale Fee and Clear of All Liens and Encumbrances.**  
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30 19. The Debtor requests that the Court approve the sale of the Inventory free and  
31 clear of all liens, claims, encumbrances and interests which may be asserted against the  
32

1 Inventory (collectively, the “**Encumbrances**”), with all such Encumbrances attaching only to  
2 the proceeds of the sale of the Inventory.

3  
4 **C. Request for Approval of Assumption and Assignment of Leases.**

5 20. As previously noted, in connection with the sale of the Inventory, the Debtor  
6 seeks assignment of five (5) executory contracts and unexpired leases. Section 365(a) of the  
7 Bankruptcy Code provides that a debtor in possession, “subject to the court’s approval, may  
8 assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).

9  
10 21. Courts apply a business judgment standard in determining whether to approve  
11 assumption or assignment. See G.I. Indus., 204 F.3d 1276 (9th Cir. 2000); In re Klein Sleep  
12 Prods., 78 F.3d 18 (2nd Cir. 1996); Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d  
13 1303, 12 C.B.C.2D 1202 (5th Cir. 1985). The business judgment standard states that in deciding  
14 whether to approve an assumption of an executory contract or unexpired lease, the Court should  
15 presume that the debtor acted prudently, on an informed basis, in good faith, and with an honest  
16 belief that the proposed course of action is in the best interest of the bankruptcy estate. See In re  
17 Yellowstone Mountain Club, LLC, Nos. 08-61570-11, 2010 WL 5071354, at \*2 (D. Mont. Dec.  
18 7, 2010), aff’d, F. App’x. 720 (9th Cir. 2012).

19  
20 22. In connection with the sale of Inventory, the Debtor will assign only those  
21 Leases that the Buyer has indicated it desires to assume, as indicated above and in the Purchase  
22 Agreement. The Debtor intends the assignment of the Leases to become effective only upon the  
23 approval and closing of the sale of Inventory.

24  
25 23. In addition, section 363(k) of the Bankruptcy Code states that a debtor’s  
26 assignment of a contract or lease relieves the trustee and the estate from any liability for any  
27 breach of such contract or lease occurring after such assignment. 11 U.S.C. § 363(k). Thus,  
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1 following assignment of the Leases to the Buyer, the Debtor will be relieved of any and all  
2 liability for such Leases. As a result, the assignment of the Leases will be a valid exercise of  
3 Debtor's sound business judgment and the Court should approve the proposed assumption and  
4 assignment of the Leases.  
5

6 **D. Good Faith Purchaser Designation.**

7  
8 24. Under section 363(m) of the Bankruptcy Code, "[t]he reversal or modification on  
9 appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of  
10 property does not affect the validity of a sale or lease under such authorization to an entity that  
11 purchased or leased such property in good faith, whether or not such entity knew of the  
12 pendency of the appeal, unless such authorization and such sale or lease were stayed pending  
13 appeal." 11 U.S.C. § 363(m). Here, the Inventory and Leases are being sold to the Buyer,  
14 subject to higher and better offers, after substantial negotiations among the parties, which  
15 supports a finding that the sale itself was conducted in good faith, and the ultimate buyer should  
16 be afforded Section 363(m) protection.  
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20 **E. Request for Surcharge.**

21  
22 25. The Debtor is aware that its assets are subject to secured liens of the Internal  
23 Revenue Service (the "**IRS**") and the Nevada Department of Taxation (the "**Department**").  
24 Importantly, however, the Debtor requests that its counsel, Schwartz Flansburg PLLC, be  
25 allowed to surcharge \$10,000.00 of the proceeds, with the remaining \$17,836.75 to be split  
26 between the IRS and Department, however the parties may agree.  
27

28  
29 26. Section 506(c) of the Bankruptcy Code allows a debtor in possession to  
30 surcharge a secured creditor for expenses incurred in preserving, protecting, enhancing the  
31 value of, or disposing of the secured creditor's collateral. See 11 U.S.C. § 506(c). To recover  
32

1 under section 506(c) of the Bankruptcy Code, the debtor in possession must make payments on  
2 account of reasonable and necessary expenses primarily to protect, preserve, enhance the value  
3 of, or dispose of collateral, which payments provide a “direct and quantifiable benefit” to the  
4 secured creditor. See In re Compton Impressions, Ltd., 217 F.3d 1256, 1262 (9th Cir. 2000)  
5 (allowing the debtor to surcharge the secured creditor for legal fees to the extent that the  
6 debtor’s counsel assisted in the sale of the collateral property); In re Orfa Corp. of Philadelphia,  
7 149 B.R. 790 (Bankr. E.D. Pa. 1993), vacated on other grounds, 1994 WL 163666 (E.D. Pa.  
8 April 26, 1994) (allowing the trustee to surcharge the secured creditor for its services to the  
9 degree that its services protected the value of the secured creditor’s collateral); In re Cann &  
10 Saul Steel Co., 86 B.R. 413 (Bankr. E.D. Pa. 1988) (allowing professional fees that benefited  
11 the secured creditor to be surcharged against its collateral).  
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16 27. Here, SF’s fees in this case from June 2017 to present, SF currently has approved  
17 fees and costs through May 31, 2017, in the amount of \$118,172.17 (see Docket No. 166), for  
18 which only \$15,170.96 has been paid.  
19

20 28. Notwithstanding the lack of payment of SF’s fees, SF had several exchanges and  
21 negotiated with the Buyer on the Debtor’s behalf, drafted the Purchase Agreement, drafted the  
22 instant motion, and will prosecute the motion and oversee the sale through closing.  
23

24 29. Indeed, SF submits that it has provided a direct and quantifiable benefit to the  
25 Debtor’s estate by providing all services with respect to the Debtor’s Chapter 11 case and the  
26 proposed sale of Inventory and assignment of the Leases, including the marketing of and the  
27 facilitation of the aforementioned transactions. Indeed, through SF’s efforts, the Debtor was  
28 able to locate and agree upon a sale price with the Buyer.  
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1           30.     Accordingly, the Debtor and SF respectfully requests that SF receive \$10,000.00  
2 from the sale proceeds for payment of its allowed administrative claim, with the remaining  
3 proceeds to be split between the IRS and the Department, however the parties may agree.  
4

5 **F.     Request for Waiver of 14-day Stay.**

6           31.     Pursuant to Bankruptcy Rule 6004(h), unless the court orders otherwise, all  
7 orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are  
8 automatically stayed for 14 days after entry of the order. See Fed. R. Bankr. P. 6004(h). The  
9 purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to  
10 request a stay pending appeal before the order can be implemented. See Advisory Committee  
11 Notes to Bankruptcy Rule 6004(g).  
12  
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14           32.     As set forth above, the sale of Inventory and assignment of the Leases is critical  
15 to enable the Debtor to sell its remaining assets to the highest and best bidder, and allow for  
16 some recoveries to its creditors and administrative claimants. Simply put, the Debtor's business  
17 is not doing well, and requiring the Debtor to wait an additional 2 weeks after any approval of  
18 the sale may cause the Debtor to lose its Leases for the Stores, thus harming the sale to Buyer  
19 and the value of the assets being sold to the Buyer under the Purchase Agreement.  
20  
21  
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23           33.     Absent the above-referenced sale which is contemplated herein, the Debtor's  
24 estate will be irreparably harmed. The Debtor therefore requests that the Court waive the  
25 fourteen-day stay period under Bankruptcy Rule 6004(h), to the extent it applies.  
26

27 **G.     No Prior Relief Requested**

28           34.     No prior Motion for the relief requested has been made to this or any other  
29 Court.  
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**NOTICE**

35. The Debtor provided notice of the Motion to 20 largest creditors, the United States Trustee, the landlords for the Leases, and the Buyer.

WHEREFORE, the Debtor respectfully requests that the Court enter an order, in the form attached here to as **Exhibit B:** (a) authorizing the Debtor to sell the Inventory free and clear of all liens and encumbrances; (b) finding the Buyer as a good faith purchaser; (c) authorizing the Debtor to assign the Leases to the Buyer; and (d) granting such other relief as the Court deems just and proper.

Dated this 28th day of August, 2017.

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**CERTIFICATE OF SERVICE**

I HEREBY certify that a true and correct copy of the foregoing was sent electronically via the Court's CM/ECF system on August 28, 2017, to the following:

RICHARD F. HOLLEY on behalf of Creditor LVC ACQUISITION CORP.

[rholley@nevadafirm.com](mailto:rholley@nevadafirm.com),  
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RICHARD F. HOLLEY on behalf of Creditor RAINBOW-LAKEMEAD, LLC

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I hereby certify that a true and correct copy of the foregoing was sent via U.S. Regular Mail on August 25, 2017, to the following:

United States Trustee  
300 Las Vegas Blvd. South #4300  
Las Vegas, NV 89101

Clark County Assessor  
c/o Bankruptcy Clerk  
500 S Grand Central Pkwy  
Box 551401  
Las Vegas, NV 89155-1401

Clark County Treasurer  
c/o Bankruptcy Clerk  
500 S Grand Central Parkway  
PO Box 551220  
Las Vegas, NV 89155-1220

Dept of Employment, Training and Rehab  
Employment Security Division  
500 East Third Street  
Carson City, NV 89713

Internal Revenue Service  
P.O. Box 7346  
Philadelphia, PA 19101-7346

Nevada Dept of Taxation, BK Section  
555 E. Washington Ave. #1300  
Las Vegas, NV 89101

State of Nevada Dept. of Motor Vehicles  
Attn: Legal Division  
555 Wright Way  
Carson City, NV 89711  
4070 Airport Center, LLC  
41865 Boardwalk Ste 106  
Palm Desert, CA 92211

American Pacific Capital Trop  
Decatur Company, LLC  
c/o Great American Capital  
8350 West Sahara Avenue, Suite 210  
Las Vegas, NV 89117

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Phoenix, AZ 85007-2926

AZ Dept of Economic Security  
PO Box 6028  
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Attn: Education and Compliance  
1600 West Monroe Street  
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C & C Roofing  
Attn: Chuck Grape  
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Labor Law Enforcement  
1550 West Main Street  
El Centro, CA 92243-2105

CA Dept of Unemployment  
658 San Brier Drive, Suite 300  
San Bernardino, CA 92408

CA Div of Labor Standards Enforcement  
7575 Metropolitan Dr., Suite 210  
San Diego, CA 92108-4424

CA Employment Dev Dept  
State of California  
Bankruptcy Unit - MIC 92E  
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Sacramento, CA 94280

California Franchise Tax Board  
Bankruptcy Section, MS A340  
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Sacramento, CA 95812-2952

California State Board of Equalization  
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Sacramento, CA 94279

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1 Capstone Brokerage, Inc.  
 2 8681 W. Sahara Ave., Suite 100  
 3 Las Vegas, NV 89117

4 Centra Pecos Legacy, LLC  
 5 c/o Alan C. Sklar, Registered Agent  
 6 410 S. Rampart Blvd. Ste 350  
 7 Las Vegas, NV 89145

8 Century Link  
 9 PO Box 4300  
 10 Carol Stream, IL 60197-4300

11 Centurylink Communications, LLC  
 12 c/o The Corp. Trust Co. of NV  
 13 Resident Agent  
 14 701 S. Carson St Ste 200  
 15 Carson City, NV 89701

16 Craig T. and Karen K. Bauske  
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 18 Henderson, NV 89011

19 CTD Sports, LLC  
 20 c/o Jay J. Schutttert, Esq.  
 21 Snell & Wilmer, LLP  
 22 3883 Howard Hughes Pkwy., Suite 1100  
 23 Las Vegas, NV 89169

24 Desert Country Plaza, LLC  
 25 68936 Adelina Road  
 26 Cathedral City, CA 92234

27 DKN Holdings, LLC  
 28 c/o WestMar Property Management  
 29 41623 Margarita Road, Suite 100  
 30 Temecula, CA 92591

31 DNA Industries, Inc.  
 32 7927 Orion Avenue  
 Van Nuys, CA 91406

DNA Sports Nutrition  
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 E&P Retail, LLC  
 c/o DSA Development  
 8965 S. Eastern Avenue, Suite 360  
 Las Vegas, NV 89123

Estate of Christopher Rosales and  
 Bryttny Raene Henson  
 c/o Jerome R. Bowen, Esq.  
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 Las Vegas, NV 89129

Europa Sports Product, Inc.  
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 Charlotte, NC 28273

First Place Nutrition #1, LLC  
 9691 Trailwood Dr., Ste. 109  
 Las Vegas, NV 89134

FirstComp  
 PO Box 3009  
 Omaha, NE 68103-0009

Focus Receivables Management, LLC  
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 Marietta, GA 30067

GWI  
 14821 Northam Street  
 La Mirada, CA 90638

HI Tech Pharmacueticals  
 1615-B Unity Dr.  
 Norcross, GA 30071

1 International Property Syndications Ltd  
 2 RE: Shops at Grand Canyon 14  
 3 9440 W. Sahara Blvd., Suite 240  
 4 Las Vegas, NV 89117

M&I Asset Management Company  
 c/o Signa Realty Group  
 601 S. Rancho Dr., Ste. A-5  
 Las Vegas, NV 89106

5 Iron Mag Labs  
 6 1860 Whitney Mesa Dr Ste 120  
 7 Henderson, NV 89014-2095

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 Omaha, NE 68103

8 Island Oasis  
 9 141A Norfolk St  
 10 Walpole, MA 02081

Mer-Car Corporation  
 c/o Gatski Commercial Real Estate Svcs.  
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11 JMS Associates for Lonestar Distribution  
 12 1489 W. Palmetto Park Road #480  
 13 Boca Raton, FL 33486

Muscle Foods USA  
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14 Las Vegas Athletic Clubs  
 15 2655 South Maryland Parkway, Suite 201  
 16 Las Vegas, NV 89109

North, LLC  
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17 Laura Kuveke  
 18 1051 Olsen #711  
 19 Henderson, NV 89011

Nutrition 53  
 Acct No x9158  
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20 LMP, LLC  
 21 c/o John M. Netzorg, Esq.  
 22 2810 W. Charleston Blvd., Suite H-81  
 23 Las Vegas, NV 89102

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 PO Box 801688  
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24 Lori J. Smith LLC  
 25 c/o Lori Smith  
 26 3155 East Patrick Lane, Ste 1  
 27 Las Vegas, NV 89120

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28 M&I Asset Management Company  
 29 c/o Tony L. Abbatangelo, Esq.  
 30 Colquitt & Abbatangelo, Ltd.  
 31 321 S. Casino Center Blvd., #112  
 32 Las Vegas, NV 89101

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 Layton, UT 84041

1 Rainbow Lake Mead, LLC  
 2 Attn: Chad O. Smith  
 3 2655 South Maryland Parkway, Suite 201  
 4 Las Vegas, NV 89109-1666  
 5 Randolph Law Firm  
 6 6260 N. Durango Dr.  
 7 Las Vegas, NV 89149

8 Sahara-Edmond Plaza, LLC  
 9 Attn: John Weisler  
 10 PO Box 60752  
 11 Boulder City, NV 89006

12 Schiek Sports Inc  
 13 2010 S. Oakwood Rd  
 14 Oshkosh, WI 54903

15 Shops at Grand Canyon 14  
 16 Syndications Group, LLC  
 17 9440 W. Sahara Ave., Suite 240  
 18 Las Vegas, NV 89117

19 Sierra Town Center III, LLC  
 20 c/o David A. Carroll, Esq.  
 21 Rice Reuther Sullivan & Carroll, LLP  
 22 3800 Howard Hughes Parkway, Suite 1200  
 23 Las Vegas, NV 89169

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24 /s/Lori Kennedy

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